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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JOLENE C. CLAYTON,

Plaintiff and Respondent, **A139435**

v. **(Marin County Super. Ct. No. CIV1101598)**

MARIN MORTGAGE BANKERS CORPORATION et al.,

Defendants and Appellants.

_____/

Plaintiff Jolene C. Clayton (plaintiff) lost her investment in a security and sued various parties involved in its sale and packaging. The trial court directed a verdict for plaintiff on her Corporations Code claims and the jury found for her on her causes of action for breach of fiduciary duty, negligence, and negligent misrepresentation.[1] The court awarded plaintiff $125,000 in attorney fees as a prevailing party pursuant to Civil

[1] Defendants Marin Mortgage Bankers Corporation (MMBC), Charles J. Flynn and Mik P. Flynn as trustees of the Flynn Family Living Trust dated May 7, 1999, Charles J. Flynn individually, and Glenn Larsen (collectively defendants) appealed, raising several claims of error. We affirmed. (*Clayton v. Marin Mortgage Bankers Corporation* (Apr. 30, 2014, A138364) [nonpub. opn.] (*Clayton*).)

Code section 1717.[2] The court awarded attorney fees against defendants jointly and severally and declined to apportion the fees among plaintiff's claims.

Defendants appeal. They contend: (1) the court erred by awarding attorney fees pursuant to section 1717 because plaintiff's "action was not brought to interpret or enforce a contract[;]" (2) the court erred by refusing to apportion fees between plaintiff's contract and tort causes of action; (3) assuming plaintiff was entitled to attorney fees, only one defendant "could be liable for such fees[;]" and (4) the amount of fees awarded was excessive. Defendants also urge us to disregard plaintiff's opposition brief because it was filed late.

We decline defendants' suggestion to disregard plaintiff's brief as untimely filed. (Cal. Rules of Court, rule 8.220.) We modify the order awarding attorney fees to award plaintiff $125,000 in attorney fees only against defendant MMBC. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We incorporate the facts and procedural history of our prior opinion and add information relevant to the issues on appeal. (*Clayton, supra,* A138364.) In the absence of a request from the parties, we do not, however, take judicial notice of the record in the prior appeal.

Plaintiff purchased a fractionalized interest in a promissory note and deed of trust on commercial property in San Francisco, known as the "600 Alabama Loan," for $150,000. In connection with the purchase of the promissory note, plaintiff and MMBC entered into a Loan Purchase Servicing and Tenancy in Common Agreement (Loan Purchase Agreement) appointing MMBC as plaintiff's agent to service the promissory note and "to protect [her] interest in and enforce [her] rights under the [promissory] Note, Deed of Trust and any other agreements, security instruments and other documents executed in connection therewith[.]" The Loan Purchase Agreement gave MMBC the power to "manage, refinance or sell" the commercial property and in turn, MMBC agreed

[2] Unless otherwise noted, all further statutory references are to the Civil Code.

to "exercise diligent and good faith efforts in the execution of its duties as agent in accordance with reasonable and customary commercial practice." The Loan Purchase Agreement contained an attorney fee clause providing: "If legal action is commenced to interpret or enforce any provisions of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and other related costs and expenses." The Loan Purchase Agreement attached an Investment Offering document and Lender Representations and Warranties.

The borrowers on the 600 Alabama Loan defaulted and the senior lender foreclosed on the property. Plaintiff did not recover the principal of her investment.

The Lawsuit

Plaintiff's complaint "for statutory rescission and for damages" alleged breach of fiduciary duty and constructive fraud claims (§ 1573) against MMBC, Charles Flynn, and Larsen and the following causes of action against all defendants: (1) rescission of the 600 Alabama Loan (Corp. Code, §§ 25401, 25501); (2) securities fraud (Corp. Code, §§ 25501, 25504); (3) securities fraud (Corp. Code, § 25401); (4) fraud/concealment; (5) negligent misrepresentation; and (6) negligence. Plaintiff sought rescission of the promissory note and deed of trust, and damages.

The court directed a verdict for plaintiff on her Corporations Code claims. The jury found for defendants on plaintiff's fraud claims and for plaintiff on her causes of action for breach of fiduciary duty, negligence, and negligent misrepresentation. The jury awarded plaintiff damages of $196,058.33.

Plaintiff's Attorney Fees Motion

Plaintiff moved for $136,027.50 in attorney fees pursuant to the Loan Purchase Agreement and section 1717. Plaintiff claimed entitlement to attorney fees as the prevailing party in the lawsuit, which she argued involved the interpretation and enforcement of the Loan Purchase Agreement. Plaintiff noted the jury determined defendants MMBC, Charles Flynn, and Larsen breached fiduciary duties to her, including the duty imposed in the Loan Purchase Agreement to learn or disclose all material information necessary for her to make informed decisions concerning her investment in

the 600 Alabama Loan. Plaintiff also claimed the way defendants "carried out [the] powers" to modify the terms of the loan documents were "at issue" in her breach of fiduciary duty claim. In addition, plaintiff argued defendants "asked for" the interpretation and enforcement of the Loan Purchase Agreement by asserting affirmative defenses based on "contract principles" in their answer to the complaint and by claiming during closing argument that plaintiff breached her own contractual duties by misrepresenting her financial condition.[3]

In opposition, defendants argued plaintiff could not recover attorney fees because the complaint alleged statutory and fraud causes of action and not a breach of contract claim. Defendants conceded the Loan Purchase Agreement was "introduced and briefly addressed in the case" but argued plaintiff's "action was not brought to interpret or enforce" the Loan Purchase Agreement. In the alternative, defendants claimed that if plaintiff was entitled to recover attorney fees: (1) any fees awarded must be limited to fees she incurred to prevail on the contract claims; (2) fees were recoverable only from MMBC, the only defendant who was a party to the Loan Purchase Agreement; and (3) the amount of fees she demanded was "excessive and unreasonable."

Following a hearing, the court adopted its tentative ruling, granted plaintiff's motion, and awarded her $125,000 in attorney fees against all defendants. In its tentative order, the court determined plaintiff "prevailed on her principal claim for rescission of her investment . . . based on Defendants' oral and written misrepresentations and failure to disclose material terms in inducing her to purchase the security. It is settled that a claim for rescission is ***an action on a contract*** for purposes of an award of attorney fees under [section] 1717." The court also concluded plaintiff was entitled to attorney fees incurred in proving her fiduciary duty claims because the Loan Purchase Agreement "created defendants' fiduciary duty as mortgage brokers to Plaintiff" and, as a result, plaintiff's "claims for breach of fiduciary duty also are deemed to be ***on the contract***[.]"

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[3] In support of the motion, plaintiff attached the complaint, defendants' answer, the Loan Purchase Agreement, and plaintiff's counsel and paralegal's billing records.

The court declined to apportion the attorney fees "among the non-contract claims" because the attorney fees related to "issues common to both the rescission and the tort claims" and because these claims were "inextricably intertwined." As the court explained, the rescission, fiduciary duty, negligence, and negligent misrepresentation claims "all litigated the same facts and issues to prove Defendants failed to disclose material facts and made false representations to induce Plaintiff to invest."

DISCUSSION

"California follows the 'American rule,' under which each party to a lawsuit must pay its own attorney fees unless a contract or statute or other law authorizes a fee award." (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237 (*Barnhart*), citing Code Civ. Proc., § 1021.) "Section 1717 governs attorney fees awards authorized by contract and incurred in litigating claims sounding in contract. [Citations.] Under that statute, when a contract provides for an award of fees 'incurred to enforce that contract,' 'the party prevailing on the contract . . . shall be entitled to reasonable attorney's fees.'" (*Barnhart*, at p. 237, quoting § 1717, subd. (a).) "'On appeal this court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law.' [Citation.]" (*Eden Township Healthcare Dist. v. Eden Medical Center* (2013) 220 Cal.App.4th 418, 425 (*Eden Township*); see also *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1615 [whether "'section 1717 applies is a legal question'" subject to de novo review].)

I.

Plaintiff's Rescission Claim is an "Action on a Contract"

Defendants contend the court erred by awarding attorney fees because plaintiff's complaint "was based *entirely* on claims sounding in fraud" and, as a result, was not an "action on a contract" for purposes of section 1717, subdivision (a). Defendants concede the lawsuit "may have arisen, in part, out of a contractual relationship between the Plaintiff and Defendant MMBC" but claim "the gravamen of the . . . complaint was undeniably fraud." (Italics omitted.)

"'"'[I]t is difficult to draw definitively from case law any general rule regarding what actions and causes of action will be deemed to be 'on a contract' for purposes of [section] 1717."' [Citation.]" (*Barnhart, supra,* 211 Cal.App.4th at p. 241.) Some principles, however, are clear. "'California courts construe the term "on a contract" liberally.' [Citation.] The phrase 'action on a contract' includes not only a traditional action for damages for breach of a contract containing an attorney fees clause [citation], but also any other action that 'involves' a contract under which one of the parties would be entitled to recover attorney fees if it prevails in the action [citation]. 'In determining whether an action is "on the contract" under section 1717, the proper focus is not on the nature of the remedy, but on the basis of the cause of action.' [Citation.]" (*Eden Township, supra,* 220 Cal.App.4th at p. 426; *Hyduke's Valley Motors v. Lobel Financial Corp.* (2010) 189 Cal.App.4th 430, 435 [relevant factors for determining whether an action is "'on a contract'" are "'the pleaded theories of recovery, the theories asserted and the evidence produced at trial, if any, and also any additional evidence submitted on the motion in order to identify the legal basis of the prevailing party's recovery . . .'"].)

Defendants point to the tort allegations in plaintiff's complaint and argue at length the general proposition that tort claims are not actions "on a contract." Plaintiff's complaint does contain tort claims such as negligence and negligent misrepresentation, and we do not disagree with the general proposition that section 1717 "does not apply to tort claims; it determines which party, if any, is entitled to attorney[ ] fees on a *contract claim only*. [Citations.]" (*Brown Bark III, L.P., v. Haver* (2013) 219 Cal.App.4th 809, 827.) We cannot, however, conclude the tort allegations in the complaint are "dispositive of [plaintiff's] fee claim" because the complaint alleges a claim for rescission.

Numerous courts have held an action to "rescind [an] . . . agreement between the parties . . . [is] not upon a cause of action in tort. . . ." (*Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 461; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 347-348 [claim seeking declaration cancelling promissory note was "'on the contract'" within the meaning of section 1717]; *Arthur L. Sachs, Inc. v. City of Oceanside* (1984) 151 Cal.App.3d 315, 322 ["action for rescission of the contract albeit

based on mistake/fraud is still an action based on a contract"]; *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 549 (*Super 7 Motel*) [where a "claim instead seeks rescission based on fraud, the courts have concluded such claim does sound in contract and permits the award of fees"].)

Here, the complaint's first claim, for "rescission or damages" is "based on fraud" but "sound[s] in contract[.]" (*Super Motel 7, supra,* 16 Cal.App.4th at p. 549.) The rescission cause of action alleged defendants made "untrue statements" and "failed to disclose material facts" regarding the 600 Alabama Loan. Plaintiff alleged defendants failed to advise her: (1) the primary real property security for the promissory note provided a loan to value ratio of 75 percent; (2) the borrowers owned only a two-third share of the Alabama Street property; and (3) property taxes on the Alabama Street property were in arrears. The cause of action also alleged plaintiff was entitled to alternative relief in the form of either rescission or damages as a result of defendants' "material representations or omissions[.]" Plaintiff tendered "return of her fractional interest" in the promissory note and sought rescission of the promissory note and deed of trust and damages of approximately $150,000, the amount of her investment.

Plaintiff's rescission claim is "on a contract" for purposes of section 1717 because the claim sought "to define or interpret [the Loan Purchase Agreement's] terms or to determine or enforce a party's rights or duties under the agreement . . . .' [Citation.]" (*Eden Township, supra,* 220 Cal.App.4th at p. 427, quoting *Barnhart, supra,* 211 Cal.App.4th at pp. 241-242.) The resolution of plaintiff's rescission claim required the court to interpret the Loan Purchase Agreement, because that document defined plaintiff's rights and obligations and required MMBC to "protect [plaintiff's] interest in and enforce [plaintiff's] rights under the [promissory] Note, Deed of Trust and any other agreements, security instruments and other documents executed in connection therewith[.]"

In light of our obligation to construe the phrase "'on the contract' liberally" (*Turner v. Schultz* (2009) 175 Cal.App.4th 974, 979) and to consider a claim "'based on contract'" when it is "unclear" whether "'the action [is] . . . based on contract rather than

tort" (*Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1178 (*Kangarlou*)) we conclude plaintiff's rescission claim is "on the contract" for purposes of section 1717, subdivision (a). (See *Reveles v. Toyota By The Bay* (1997) 57 Cal.App.4th 1139, 1152, fn. 6, disapproved on another point in *Galvadon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1261 ["[a]n action for rescission is an 'action on a contract' for purposes of an award of attorney fees . . . under section 1717"].)

The cases defendants cite, *Santisas v. Goodin* (1998) 17 Cal.4th 599, 615, *Stout v. Turney* (1978) 22 Cal.3d 718 and *Loube v. Loube* (1998) 64 Cal.App.4th 421, are inapposite because they do not involve a party seeking to rescind a contract. Having reached this result, we need not determine whether defendants' references to a contract in their affirmative defenses and their introduction of the Loan Purchase Agreement into evidence at trial were sufficient, by themselves, to render plaintiff's complaint an action "on the contract" pursuant to section 1717. (See, e.g., *Windsor Pacific LLC v. Samwood Co., Inc.* (2013) 213 Cal.App.4th 263, 274-275, disagreeing with *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, and *Gil v. Mansano* (2004) 121 Cal.App.4th 739.)

Defendants also claim the court erred by determining plaintiff was entitled to recover attorney fees incurred in proving her fiduciary duty claim because breach of fiduciary duty "sounded in tort—not 'on a contract.'" We need not determine whether plaintiff's fiduciary duty cause of action is "on a contract" for purposes of section 1717 because, as we discuss below, a trial court need not apportion attorney fees when those fees are "'incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.' [Citation.]" (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111 (*Abdallah*).)

II.

The Court Was Not Required to Apportion the Attorney Fee Award Between Contract and Tort Claims

Next, defendants contend the court should have apportioned the attorney fee award between the contract and noncontract causes of action. "Apportionment of a fee award

between fees incurred on a contract cause of action and those incurred on other causes of action is within the trial court's discretion [citation] . . ." (*Abdallah, supra,* 43 Cal.App.4th at p. 1111.) "Once a trial court determines entitlement to an award of attorney fees, apportionment of that award rests within the court's sound discretion. [Citations.] We review the court's decisions for abuse of discretion. [Citation.] The court abuses its discretion whenever it exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish that discretion was clearly abused and a miscarriage of justice resulted." (*Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 505.)

When "'a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under . . . section 1717 only as they relate to the contract action.' [Citation.]" (*Abdallah, supra,* 43 Cal.App.4th at p. 1111, quoting *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129.) However, "'[a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.' [Citation.]" (*Abdallah, supra,* 43 Cal.App.4th at p. 1111.) Additionally, a court need not apportion fees "'when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units.' [Citations.]" (*Maxim Crane Works, L.P. v. Tilbury Constructors* (2012) 208 Cal.App.4th 286, 298.)

Here, the court concluded the attorney fees related to issues common to the rescission and tort claims and that the claims were "inextricably intertwined." As the court explained, the rescission, fiduciary duty, negligence, and negligent misrepresentation claims "all litigated the same facts and issues to prove Defendants failed to disclose material facts and made false representations to induce Plaintiff to invest." This conclusion was not an abuse of discretion. The court could reasonably find plaintiff's various claims were "'inextricably intertwined'" (*Finalco, Inc. v. Roosevelt* (1991) 235 Cal.App.3d 1301, 1308) making it "impracticable, if not impossible, to

separate the multitude of conjoined activities into compensable or noncompensable time units." (*Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 227). We conclude the court did not abuse its discretion by declining to apportion attorney fees between plaintiff's claims.

III.

The Court Erred by Imposing Attorney Fees Against All Defendants Jointly and Severally

Defendants challenge the court's imposition of attorney fees against all defendants jointly and severally: they contend only defendant MMBC "could be liable" for attorney fees because it was the only defendant who signed the Loan Purchase Agreement. Defendants claim, Larsen, Charles Flynn, and Mik Flynn are not liable for section 1717 attorney fees "under a contract to which they were strangers[.]"

In response, plaintiff concedes MMBC is the only signatory defendant to the Loan Purchase Agreement, but contends "the terms of the Agreement set[ ] forth the mutual obligations both of Plaintiff and MMBC" and describe "the obligations and duties of Flynn and Larsen as brokers/agents of MMBC (as licensees, the only persons through whom MMBC can legally act). Moreover, the jury specifically found that Flynn and Larsen were acting as agents of Mik P. Flynn, with regard to the causes of action for Negligence and Negligent Misrepresentation."[4] According to plaintiff, each defendant is liable for attorney fees under the reciprocity principles of section 1717.

Generally, section 1717 attorney fees "are awarded only when the lawsuit is between signatories to the contract[,]" i.e., plaintiff and MMBC. (*Cargill, Inc. v. Souza* (2011) 201 Cal.App.4th 962, 966.) In certain limited situations, however, a nonsignatory party may be entitled to attorney fees pursuant to section 1717. (*Id.* at p. 966.) One situation is where the nonsignatory party "'stands in the shoes of a party to the contract.'" (*Ibid.*, quoting *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 897.) "In that situation, the nonsignatory party is liable for attorney

[4] In their reply brief, defendants describe plaintiff's summary of the jury's determination as "questionable."

fees if it would have been entitled to fees if it prevailed." (*Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1018 (*Apex*).)

The complaint alleged "each of the defendants was the agent, servant, employee, partner and/or joint venturer of each of the remaining defendants" and that there was a "unity of interest" among defendants Larsen and MMBC and that these two defendants acted "as alter ego of the other." The complaint also alleged Larsen "and others" owned, controlled, and operated "MMBC for their personal benefit." From what we can glean from the record before us and from our prior opinion, defendant Larsen signed the Loan Purchase Agreement as the president and sole shareholder of MMBC. Defendant Charles Flynn was a sales agent and/or contractor for MMBC and defendants Mik and Charles Flynn were the original owners and holders of the 600 Alabama Loan.

We do not have a complete record of the evidence submitted at trial and the jury verdict and judgment are not part of the record in this appeal. As a result, we cannot determine whether the court or the jury found liability on alter ego or aiding and abetting theories. As a result, and on the record before us, we cannot conclude defendants Larsen, and Charles and Mik Flynn stand in the shoes of or are bound by the terms of the Loan Purchase Agreement for purposes of attorney fees awarded pursuant to section 1717. (*Diamond Heights Village Assn., Inc. v. Financial Freedom Senior Funding Corp.* (2011) 196 Cal.App.4th 290, 307; cf. *Apex*, *supra*, 222 Cal.App.4th at p. 1018 [nonsignatory "stood in the shoes" of signatory to contract providing for section 1717 attorney fees].) Nor are we persuaded by plaintiff's cursory argument that each defendant is liable for attorney fees "under the reciprocity policy of . . . [s]ection 1717." Defendants did not plead as an affirmative defense or in a prayer for relief in their answer an entitlement to attorney fees under a contract, or on any other theory. Plaintiff has not established defendants Larsen, and Charles and Mik Flynn would have been entitled to attorney fees had they prevailed on plaintiff's rescission claim.

We decline defendants' suggestion — made for the first time at oral argument — that we should reverse the judgment to enable the court to rehear plaintiff's attorney fee motion. We also decline to analyze cases cited by plaintiff for the first time at oral

argument. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 232, fn. 6 ["We need not consider points raised for the first time at oral argument . . ."].)

IV.

Defendants' Challenge to the Amount of Attorney Fees Awarded Fails

Defendants' final contention is the fee award should be reduced by an unspecified amount because another attorney with a lower billing rate could have performed certain tasks and because certain billings "exceed the number of hours that could be considered 'reasonably spent'" on the case. It is well settled "'[t]he "experienced trial judge is the best judge of the value of professional services rendered in his [or her] court. . . ." [Citations.]' [Citation.]" (*City of Santa Paula v. Narula* (2003) 114 Cal.App.4th 485, 494 (*Narula*).) We "affirm an award of attorney fees absent a showing that the trial court clearly abused its discretion. [Citation.]" (*Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 549 (*Jones*).) Because of the "very deferential standard of review" applied to "trial court determinations of reasonable attorney fees . . . it is quite difficult to overturn a fee award on the ground that the fees are excessive." (Pearl, Cal. Attorney Fee Awards (Cont. Ed. Bar 3d ed.) §§ 16:23, 16:25, pp. 16-13, 16-15.)

Here, plaintiff sought $136,027.50 in attorney fees. In support of the fee motion, plaintiff submitted time sheets for two attorneys and a paralegal, and a declaration from lead counsel describing the attorneys' experience and averring the amount of fees plaintiff sought was "reasonable in light of the complexity of the case, the number of documents contained in Defendants' files, and the necessity to present the case for jury determination." In opposition, defendants claimed the fees were "excessive and unreasonable" but did not submit different estimates of reasonable fees nor evidence demonstrating the fees claimed were unreasonable.

We reject defendants' challenge to the amount of fees awarded. Numerous courts have rejected challenges to the amount of fees awarded where — as here — the parties opposing the fee request did not, in the trial court, provide "evidence that the fees claimed were not appropriate, or obtain the declaration of an attorney with expertise in

the procedural and substantive law to demonstrate that the fees claimed were unreasonable." (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564; *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 986 [upholding attorney fee award; defendants failed "to quantitatively analyze plaintiff's billing records in order to submit different estimates of reasonable fees"]; *Narula, supra,* 114 Cal.App.4th at p. 494 [upholding fee award in part because the parties opposing the award "filed no declarations in opposition to the fees and presented no proof that there was a duplication of services"].) Defendants have not — and cannot — demonstrate the attorney fee "award shocks the conscience or is not supported by the evidence" (*Jones, supra,* 127 Cal.App.4th at p. 550) where defendants did not "include specific evidence supporting [their] assertions and/or controverting disputed facts asserted by the claiming attorney" in the trial court. (Pearl, Cal. Attorney Fee Awards, *supra,* § 11.60, p. 11-64.)

DISPOSITION

The June 5, 2013 order awarding plaintiff $125,000 in attorney fees is modified to impose such fees only against defendant Marin Mortgage Bankers Corporation. In all other respects, the order is affirmed. The parties shall bear their own costs on appeal.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.